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IN THE

Supreme Court of the United States

October Term, 1937.

No. 21, Original.

In the Matter of the Petition of the National Labor Relations Board for a Writ of Prohibition and for a Writ of Mandamus Against the Honorable Joseph Buffington, the Honorable J. Warren Davis, and the Honorable J. Whitaker Thompson, Circuit Judges of the Third Judicial Circuit, and the Other Judges and Officers of the United States Circuit Court of Appeals for the Third Circuit.

Brief of Republic Steel Corporation in Opposition to the Issuance of a Writ of Prohibition and a Writ of Mandamus Against the Judges and Officers of the United States Circuit Court of Appeals for the Third Circuit.

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THOMAS F. PATTON,
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IN THE MATTER OF THE PETITION OF THE NATIONAL LABOR
RELATIONS BOARD FOR A WRIT OF PROHIBITION AND FOR
A WRIT OF MANDAMUS AGAINST THE HONORABLE JOSEPH
BUFFINGTON, THE HONORABLE J. WARREN DAVIS, AND THE
HONORABLE J. WHITAKER THOMPSON, CIRCUIT JUDGES OF
THE THIRD JUDICIAL CIRCUIT, AND THE OTHER JUDGES AND
OFFICERS OF THE UNITED STATES CIRCUIT COURT OF
APPEALS FOR THE THIRD CIRCUIT.

BRIEF OF REPUBLIC STEEL CORPORATION IN
OPPOSITION TO THE ISSUANCE OF A WRIT
OF PROHIBITION AND A WRIT OF MANDAMUS
AGAINST THE JUDGES AND OFFICERS OF
THE UNITED STATES CIRCUIT COURT OF
APPEALS FOR THE THIRD CIRCUIT.

STATEMENT OF FACTS.

The National Labor Relations Board (hereinafter called the "Board"), upon charges and supplementary charges filed by the Steel Workers' Organizing Committee, an alleged labor organization, issued its complaint dated July 15, 1937 against Republic Steel Corporation, a New Jersey Corporation, (hereinafter called the "Corporation"), employing normally approximately 60,000 workers

and operating ore and coal mines and steel plants in various states of the United States, including the State of Ohio. Such complaint alleged that the Corporation had engaged in and was engaging in unfair labor practices within the meaning of Sections 8, (1), (2) and (3), and Sections 2, (6) and (7) of the National Labor Relations Act, 49 Stat., 449, which allegations were denied by the Corporation in its answer duly filed.

A hearing was begun before the Board on said complaint on July 21, 1937, and after some testimony was adduced the hearing was continued before a Trial Examiner designated by the Board and was concluded on September 27, 1937.

Proceeding without report from the Trial Examiner and without oral arguments or exceptions or briefs filed on behalf of the Corporation, the Board, without any prior notice to the Corporation, on April 8, 1938, issued its decision and order consisting of approximately 124 pages embodying a discussion of testimony, findings of fact, and conclusions of law and the order of the Board purportedly based upon such findings and conclusions.

In its decision the Board found that the Corporation had engaged in and was engaging in specified practices allegedly in violation of said National Labor Relations Act. The Board ordered, among other things, that the Corporation cease and desist from specified alleged practices; that the Corporation withdraw all recognition from specified labor organizations, of which many of its employees were members, as representatives of any of the Corporation's employees for specified purposes and dis-establish such organizations; that the Corporation reinstate to their former or substantially equivalent positions with the Cor-

poration, without prejudice to their seniority and other rights and privileges, twenty-seven former employees named in the complaint and make such persons whole for any loss of wages suffered by them; that upon their application the Corporation reinstate in a specified manner to their former or substantially equivalent positions with the Corporation without prejudice to their seniority and other rights and privileges, approximately 5000 former employees, none of whom were named or even referred to in the complaint, nor any claim made for them during the entire hearing but who had gone out on strike on or about May 26, 1937, and who had not accepted the offer of the Corporation to return to work when the plants of the Corporation involved in this proceeding reopened in late June and early July, 1937, and who had not prior to April 8, 1938, the date of the Board's order, applied for reinstatement; that the Corporation, among other things, pay to each of said strikers a sum sufficient to equal that which each would normally have earned as wages during the period from any refusal by the Corporation of any such application for reinstatement to the offering of reinstatement by the Corporation to such strikers, less amounts, if any, which each earned during said period.

The Corporation, believing itself aggrieved by the Board's said order, dated April 8, 1938, filed in the United States Circuit Court of Appeals for the Third Circuit on April 18, 1938, a petition to review said order, requesting that the same be set aside.

On the same day that the Corporation filed its petition for review it served a copy thereof upon the Board and accompanied it with a letter, the pertinent paragraph of which is as follows:

"Said act requires that there shall be filed in the court a transcript of the entire record in the proceedings certified by your Board, including the pleadings, testimony upon which the order complained of is entered, and the findings and the order of your Board. Will you kindly prepare immediately the record so required by law and certify the same and send it to the Clerk of the Circuit Court of Appeals at Philadelphia, or deliver same to us so that we may file it with him. If you desire us to take the latter course, kindly advise when the record has been certified and we will obtain it from you. We shall, of course, pay any charges you may have in this connection."

To this letter the General Counsel of the Board in a letter dated the same day, replied as follows:

"I have your letter of April 18th and received today a copy of your petition for review of the Board's order filed in the Third Circuit. We will proceed to get up the record as promptly as possible for certification to the Court."

The Corporation, on April 22, 1938, filed in the Circuit Court of Appeals, a petition for a stay and suspension of the order of the Board pending a decision on the merits by that Court. The hearing on this petition was had on April 30, 1938, and at that time the Counsel for the Board appeared and resisted such petition on its merits by full argument to the Court and by filing a brief with the Court and at that time stated that the Board was seriously considering withdrawing its order in this case, and would advise the Court of its decision within a few days. He also asked leave to file a reply brief on the argument of the Corporation for the stay, which brief was to have been filed on or before May 4, 1938.

On May 3, 1938, the Circuit Court of Appeals issued an order in the nature of a rule to show cause why the Board should not file the transcript certified and enjoined the Board from taking any other proceedings until the return day of the rule, which was May 13, 1938.

The Board, on May 3, 1938, sent a telegram through the Western Union Telegraph Company to one of the counsel of the Corporation. The telegram was for the purpose of advising that the Board proposed to withdraw its order on the following day. It is not material, but for the purpose of the record, the telegram was never received by the counsel to whom it was sent, nor does the Western Union Telegraph Company have any record of its being signed for when it claims it was delivered. The Court issued its order prior to the time of the alleged delivery of the telegram.

The Board, on May 6, 1938, filed a motion to vacate the restraining order which was argued on May 9, 1938. On the return day of the rule to show cause why the transcript certified by the Board should not be filed, which was May 13, 1938, the Circuit Court of Appeals entered an order requiring the Board to file forthwith the transcript certified by it, and staying all proceedings until the Board did file a transcript certified. It is from the entry of this order that the Board is now seeking relief from this Court in the nature of a writ of prohibition and a writ of mandamus against the Honorable Joseph Buffington, the Honorable J. Warren Davis and the Honorable J. Whitaker Thompson, Judges of the Third Judicial Circuit, who constituted the Court entering the order.

Argument.

The Corporation contends:

First. The writ of prohibition and the writ of mandamus are extraordinary writs and should only be granted in most unusual cases. The present case is not one calling for the issuance of such extraordinary writs.

Second. Jurisdiction of the Circuit Court of Appeals to issue the order complained of is conferred by Section 10 (f) of the National Labor Relations Act, and by Section 377, Title 28, U. S. C. A.

Third. Section 10 (d) of the National Labor Relations Act has no application to the independent right of review granted an aggrieved party by Section 10 (f) of the Act.

Fourth. The Board does not intend to modify or set aside in whole or in part its order as contemplated by said Section 10 (d) and therefore cannot properly urge that the Court was without jurisdiction to make the order complained of.

Fifth. The Board should not be permitted to take advantage of its own acts in failing to certify the transcript as required by law, and as it undertook to do on April 18, 1938 and subsequently thereto.

I.

The Writ of Prohibition and the Writ of Mandamus Are Extraordinary Writs and Should Only Be Granted in Most Unusual Cases. The Present Case Is Not One Calling for the Issuance of Such Extraordinary Writs.

The issuing of a writ of prohibition or mandamus by this Court to a United States Circuit Court of Appeals as herein sought is an extraordinary remedy and will be

granted only under exceptional circumstances. This Court has had occasion in several instances to express its views on the principles governing the issuance of such writs.

In the case entitled, *In the Matter of the State of Oklahoma by Charles N. Haskell, Governor*, 220 U. S. 191, the first and second syllabi read:

“Prohibition is an extraordinary writ which will issue against a Court which is acting clearly without any jurisdiction whatever, and where there is no other remedy; but where there is another legal remedy, by appeal or otherwise, or where the question of jurisdiction is doubtful or depends on matters outside the record, the granting or refusal of the writ is discretionary. In *Re Rice* 155 U. S., 396.

“Mandamus cannot perform the office of an appeal or writ of error and is only granted as a general rule where there is no other adequate remedy. *Re Atlantic City R. R. Co.*, 164 U. S. 633.”

In *Ex Parte in the Matter of Chicago, Rock Island & Pacific Rwy. Co.*, petitioner, 255 U. S. 273, Mr. Justice Brandeis, speaking for the Court, said, beginning on page 275 of the opinion:

“There is a well-settled rule by which this Court is guided upon applications for a writ of prohibition to prevent a lower Court from wrongfully assuming jurisdiction of a party, of a cause, or of some collateral matter arising therein. If the lower Court is clearly without jurisdiction the writ will ordinarily be granted to one who at the outset objected to the jurisdiction, has preserved his rights by appropriate procedure and has no other remedy. In *re Rice*, 155 U. S. 396. If, however, the jurisdiction of the lower Court is doubtful, *Ex parte Muir*, 254 U. S. 522; or if the jurisdiction depends upon a finding of fact made upon evidence

which is not in the record, *In re Cooper*, 143 U. S. 472, 506, 509; or if the complaining party has an adequate remedy by appeal or otherwise, *Ex parte Tiffany*, 252 U. S. 32, 37; *Ex parte Harding*, 219 U. S. 363; the writ will ordinarily be denied."

To the same effect see *In Re Rice*, 155 U. S. 396; *In Re Atlantic City R. R. Co.*, 164 U. S. 633; *In Re The Huguley Mfg. Co.*, 184 U. S. 297; *Ex parte Harding*, 219 U. S. 363; *Ex parte Roe*, 234 U. S. 70; in the matter of *First National Bank of Dexter, New York*, 228 U. S. 516; *Ex parte In The Matter of United States*, 263 U. S. 389.

Upon the principles of law above set forth, the case presented by the petition and the return does not entitle the Board to the extraordinary remedy herein sought.

There is no question but that the decision of the Court of Appeals in this case is one that is subject to review by the Supreme Court of the United States. (Sections 10 (e) and 10 (f) of the National Labor Relations Act (Act of Congress July 5, 1935; 49 Stat. 10 and Section 240 (a) of the Judicial Code as amended (43 Stat. 938) (U. S. C. title 28, secs. 346 and 347)).

Where the question presented by a petition for a writ of prohibition and a writ of mandamus is one that is reviewable by this Court and the question can be ultimately reviewed when the whole case is before the Court, such extraordinary relief has never been granted and the Court has left the parties to have their rights determined upon the ultimate appeal of the case.

We believe for the reasons hereinafter set forth that the Circuit Court of Appeals had jurisdiction in this case. But if we are not correct in this contention, the most that can be claimed by the Board in this proceeding is that the

decision of the Circuit Court of Appeals as to its jurisdiction is erroneous. Such being the case, the Board may take its exception to the decision of the Circuit Court of Appeals on this question and when the case is ultimately reviewed by this Court, if it is ever so reviewed, such alleged error may be urged and the Board given full opportunity to present its views with relation thereto.

Even if the jurisdiction of the Circuit Court of Appeals is doubtful, that Court, having determined that question by the exercise of its own judgment, should not now be subjected to a writ of prohibition or mandamus.

II.

Jurisdiction of the Circuit Court of Appeals to Issue the Order Complained of Is Conferred by Section 10 (f) of the National Labor Relations Act, and by Section 377, Title 28, U. S. C. A.

Section 10 (f) of the National Labor Relations Act in its entirety reads as follows:

“(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the Court of Appeals of the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith served upon the Board, and thereupon the aggrieved party shall file in the court a transcript of the entire record in the proceeding, certified by the Board, including the pleading and testimony upon which the order complained of was entered and

the findings and order of the Board. Upon such filing, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e), and shall have the same exclusive jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; and the findings of the Board as to the facts, if supported by evidence, shall in like manner be conclusive."

This section specifically sets forth the manner in which the Circuit Court of Appeals may obtain jurisdiction upon an appeal by an "aggrieved person." Jurisdiction of the subject matter is conferred by the first sentence of the section, which expressly states that an aggrieved person "may obtain a review of such order . . . by filing in such court a written petition praying that the order of the Board may be modified and set aside".

Jurisdiction of the other party, namely the Board, is obtained pursuant to the second sentence which states, inter alia: "copy of such petition shall be forthwith served upon the Board." That sentence also provides for filing in such Court a transcript of the record.

In the third sentence of the section, it states upon said filing the Court shall proceed in the same manner as in the case of an application by the Board under subsection (e) and shall have the same exclusive jurisdiction ". . . to make and enter a decree and set aside in whole or in part the order of the Board; . . ." The Corporation here contends that the words in the third sentence "upon such filing" properly refer to the filing called for in the first sentence, namely, the written petition which is to be

filed in the Court praying that the order of the Board be modified and set aside and do not refer to the filing of the transcript. If there is an ambiguity in this section it should be resolved in favor of the aggrieved person as the entire section is for the relief of the aggrieved person. Certainly it should not be seriously contended that the words "upon such filing" refer to the filing of the transcript certified by the Board since the latter act is controlled entirely by the Board. Such construction would place the aggrieved person in a position where it would not be entitled to its independent review except at the pleasure of the Board. The Corporation further contends that the filing of the record as called for in Section 10 (f) is not a requisite of jurisdiction by the Circuit Court of Appeals but is merely a procedural and ministerial function which must be performed.

It cannot be contended seriously that Congress intended to prevent a Circuit Court of Appeals from having jurisdiction to review the Board's order on a petition by an aggrieved person until such time as the Board certified to the Court the transcript. Under such construction the Board when it desires to enforce an order can certify to the transcript, file it and endeavor to have the order enforced, whereas an aggrieved person requesting a transcript certified by the Board is entirely at the will of the Board as to whether the Board does certify such transcript. We submit the aggrieved person's rights should not be subject to such restrictions, for if they are the aggrieved person would be deprived of due process of law and the independent right to apply to a Circuit Court of Appeals for an independent review of the Board's order. This Court has indicated that it places no such construction upon the provisions of the Act when it stated in *Myers v. Bethlehem Shipbuilding Corporation*, 58 Sup. Ct. 459, 462; U. S. :

"The independent right to apply to a Circuit Court of Appeals to have an order set aside is conferred upon any party aggrieved by the proceedings before the Board."

And in *National Labor Relations Board v. Jones & Laughlin*, 301 U. S. 1, 47.

"We construe the procedural provisions as affording adequate opportunity to secure judicial protection against arbitrary action in accordance with the well-settled rules applicable to administrative agencies set up by Congress to aid in the enforcement of valid legislation."

If the Act is construed to make the right of appeal granted to an aggrieved person by Section 10 (f) thereof, dependent upon the taking by the Board of action entirely within its own control, the certification of the record, we submit that the act in its entirety is unconstitutional in that it deprives the aggrieved person of due process of law and the equal protection of the laws.

That Congress never intended to prevent the Circuit Court of Appeals from having jurisdiction upon the petition of an aggrieved person to review the Board's order until such time as the Board certified to a transcript, is clear from a comparison of Sections 10 (e) and 10 (f) of the National Labor Relations Act. Under Section 10 (e) which is the section authorizing enforcement by the Board of its orders, jurisdiction over the person complained of is obtained by the issuance of process from the Circuit Court of Appeals after the filing by the Board of a duly certified transcript of the record and proceedings before it. Consequently the Circuit Court of Appeals is powerless to issue its process until such time as a certified copy of the tran-

script has been filed. In proceedings by an aggrieved person for review under Section 10 (f) however, jurisdiction of the Board is had by merely filing in the Court a petition for review and serving upon the Board a copy thereof. There is no necessity as a condition precedent to obtaining jurisdiction of the National Labor Relations Board, that a certified transcript of the record and proceedings below be filed.

Consequently it is clear that after the filing of a petition for review by an aggrieved person and service of a copy thereof upon the Board, the Circuit Court of Appeals has jurisdiction of the subject matter and the parties.

Section 10 (f) contemplates that proceedings shall be started by a petitioner by filing in a Circuit Court of Appeals of the United States a written petition praying that the order of the Board be modified or set aside.

The fact that a Circuit Court of Appeals has jurisdiction upon the commencement of proceedings under subsection (f) to grant orders is shown by the language of subsection (g) of Section 10, which provides for stay orders in the following language:

“The commencement of proceedings under subsection (e) or (f) of this section shall not, unless specifically ordered by the court, operate as a stay of the Board’s order.”

From the foregoing, it necessarily follows that the Circuit Court of Appeals has jurisdiction under Section 10 (f), *even though no transcript has been filed*, in such court, by an aggrieved person.

The Circuit Court of Appeals. Had Express Statutory Authority to Make the Order Complained of.

That the order entered by the Board in this case was subject to review by the Circuit Court of Appeals is beyond question. Section 10 (f) of the Act expressly so provides. It is conceded that in the present case the Corporation filed its petition for a review, served a copy thereof upon the Board as required by the Act, and requested the Board to certify a transcript of the record which the Board undertook to do. Under these circumstances the necessary steps to perfect the appeal had been taken, at least to the extent that it was within the power of the Corporation to take them. The Court, therefore, had the right by the express terms of the Judicial Code to issue such writs as were necessary to perfect the appeal, and indeed to protect its jurisdiction if necessary. 36 Stat., 1162, Title 28 U. S. C. A. 377 provides as follows:

“The Supreme Court and the district courts shall have power to issue writs of scire facias. The Supreme Court, the circuit courts of appeals, and the district courts shall have power to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law.”

The order about which complaint is made in this proceeding is an order of the Circuit Court of Appeals directing the Board to file a copy of the transcript certified by it and restraining the Board from taking any other action until such certified transcript is filed in the Court. The jurisdiction and power of the Circuit Court of Appeals to issue this order is, we submit, conferred by Section 377 (supra). It is just for such purpose that Section 377 was enacted and has been availed of by Appellate Courts.

McClellan v. Garland, 217 U. S. 268;

In the Case of United States Petitioner, 194 U. S. 194;

In Re Crane, 5 Pet. 190, 193;

United States v. Wong Ock Hong, 179 Fed. 1004;

Barber Asphalt Paving Co. v. Morris, 132 Fed. 945. (Cited with approval in *Ex Parte United States*, 287 U. S. 241, at page 246.)

The jurisdiction of the Circuit Court of Appeals to enter the order complained of being specifically authorized by statute, it follows that neither a writ of prohibition nor mandamus should be issued against it.

III.

Section 10 (d) of the National Labor Relations Act Has No Application to the Independent Right of Review granted an Aggrieved Party by Section 10 (f) of the Act.

Section 10 (d) of the Act does not and cannot affect the right of an aggrieved person to an independent review given to it under Section 10 (f). Section 10 (d) is as follows:

“Until a transcript of the record in a case shall have been filed in a court, as hereinafter provided, the Board may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it.”

It is respectfully submitted that this section applies only to proceedings enforceable by the Board under Section 10 (e) of the Act, and that it has no application whatsoever to proceedings instituted by an aggrieved person under Section 10 (f) of the Act.

Section 10 (d) is merely declaratory of the common law, that a moving party at all times, subject to certain limited restrictions, has complete control of his suit and is entitled to a non-suit at any time prior to final judgment.

The Board proceeds under Section 10 (e) to enforce its orders. An aggrieved person proceeds under Section 10 (f) to secure an independent review of the Board's order. These sections are dissimilar and give different respective rights to the parties for whose benefit they were enacted. The Board, however, would seem to contend that it should have control of proceedings, not only brought by itself, but also by an aggrieved person since under 10 (d) of the Act it claims that at any time until the transcript is filed it can exercise the rights thereunder.

In the instant case the Board is not the moving party—the corporation is the moving party, and its appeal should be free from the control of the Board, otherwise the Act does not give the aggrieved person the independent right of review necessary for due process and equal protection of the laws.

In addition, appeals pending before appellate tribunals of the United States are governed by pertinent provisions of the Judicial Code. It is not reasonable to assume that Congress intended by the passage of the National Labor Relations Act to limit or interfere with any of the privileges and powers of the appellate courts of the United States. If Section 10 (d) applies to proceedings initiated pursuant to Section 10 (f) the conclusion necessarily follows that even though an aggrieved person were to comply in so far as it possibly could, with the statutory requirements set forth in Section 10 (f), and even though the jurisdiction of such Court were to be invoked thereby, such a review

and proceeding might be defeated in its entirety by a refusal or failure of the Board to file its transcript. Moreover, it cannot be disputed that the mere filing of or certifying to a transcript is a simple ministerial function and that normally the performance of ministerial functions can be compelled by the issuance of writs in aid of appellate jurisdiction. If Section 10 (d) were to be interpreted as applicable to Section 10 (f) said Section 10 (d) would not only affect but might nullify the right of appellate courts to issue orders in aid of their appellate jurisdiction requiring the performance of mere ministerial acts.

We respectfully submit therefore that no such intention can be imputed to Congress and that reasonable construction of the statute as a whole as well as the construction essential to make the Act consonant with other Congressional enactments, requires the conclusion that Section 10 (d) has no application whatever to proceedings under Section 10 (f) but is limited to those proceedings under Section 10 (e).

Even if Section 10 (d) applies proceedings thereunder are subject to judicial review and must be taken in the manner and within the time limitations imposed by other sections of the Act, other Congressional enactments and judicial decisions.

The Act requires the Board to certify to the transcript of the record of the proceeding to review its order, but no specified time is set forth within which the Board must make such certification. The Act requires the aggrieved party to file a transcript of the entire record certified to by the Board. Section 10 (d) of the Act grants to the Board the right to vacate or modify its order, until the filing of the transcript. As there is no specified time

within which such transcript must be certified to or filed it would necessarily follow that the right of the Board if not restricted by other sections of the Act, judicial decisions or other Congressional Act would be an indeterminate one and could be exercised at any time that the Board in its uncontrolled discretion saw fit.

Normally the right of a judicial body to modify or vacate its own order is suspended when an appeal is taken to a higher court.

Delaware, Lackawanna & Western R. R. Co. v. Rellstab, 276 U. S. 1;

United States v. Mayer, 235 U. S. 55;

Ensminger v. Powers, 108 U. S. 292;

Keyser v. Farr, 105 U. S. 265;

Draper v. Davis, 102 U. S. 370;

Roemer v. Simon, 91 U. S. 149.

In *Ensminger v. Powers* (supra), this Court, at page 302, stated:

“While the appeal was pending, here although there was no supersedeas, the Circuit Court had no jurisdiction to vacate the decree, in pursuance of the prayer of a bill of review, because such relief was beyond its control.”

We see no reason why the normal and customary rules should not apply to the Board which at most is a quasi-judicial legislative court, having no inherent equitable or judicial power. The Board has failed to call to our attention any decision which would take the privilege granted under Section 10 (d) out of the normal rules applicable thereto nor any reason therefor. We believe that the time

within which the Board may exercise its right to vacate or modify is necessarily limited by Section 10 (f) of the Act and that after filing of a petition thereunder and service of a copy thereof upon the Board, the Board has no further power to vacate or modify its order.

If we are in error in our interpretation, then upon the construction of the Act most favorable, to the Board, the longest period of time within which the Board might vacate or modify its order, pursuant to Section 10 (d), during the pendency of an appeal under Section 10 (f), would be up to the time when the jurisdiction of the Circuit Court of Appeals had attached through affirmative action in aid of its Appellate jurisdiction.

In the present case the Circuit Court of Appeals for the Third Judicial Circuit prior to any modification or setting aside by the Board of its order issued on May 3, 1938, a rule to show cause why the Board should not be directed to certify to and file the transcript, and also issued a stay preventing the Board from taking any further proceedings until the return day of said rule.

We respectfully submit that the rule and stay were properly issued as they did nothing more than require the Board to perform a simple ministerial function.

Ex Parte Abdu, 247 U. S. 27;

In the Case of United States Petitioner (Supra);

In Re Crane (Supra);

United States v. Wong Ock Hong (Supra);

Barber Asphalt Paving Co. v. Morris (Supra).

The Circuit Court of Appeals for the Third Circuit having pursuant to law undertaken to protect its Appellate jurisdiction, we respectfully submit that the power of the Board to vacate its order had been terminated.

IV.

The Board Does Not Intend to Modify or Set Aside in Whole or in Part Its Order as Contemplated by Said Section 10 (d) and therefore cannot properly urge that the Court Was Without Jurisdiction to Make the Order Complained of.

The present order of the Board is a final order.

Myers v. Bethlehem Shipbuilding Corp. (supra).

The only power granted to the Board by Section 10 (d) of the Act in respect of such final order is to modify or set it aside in whole or in part. The Board, however, in paragraph 5; on page 7 of its petition, has outlined the procedure which it contemplates following, namely:

“Subsequent to April 25, 1938, the Board instituted the practice of specifically calling the attention of the parties in all proceedings before it to their right to submit briefs to the Board and upon request to be heard by the Board in oral argument. The Board also determined that in cases thereafter decided which had been initiated or transferred before it (unless reasons to the contrary should appear in particular cases) an intermediate report should be prepared by a trial examiner and served upon the parties or, in the alternative, that proposed findings of fact and conclusions of law should be prepared by the Board and served upon the parties, with express notice to the parties of their right to take exceptions to the intermediate report or proposed findings and upon request to be heard by the Board in argument, oral or upon brief, upon such exceptions. With respect to certain such cases already decided, in which complaint had been made of the absence of an intermediate report or

proposed findings, or of lack of argument, written or oral, the Board, although advised that its orders therein were in accordance with law, nevertheless determined to vacate the orders, to restore the cases to its docket, and to reconsider and redetermine the cases after giving full opportunities to the parties to except to proposed findings of fact and conclusions of law and after giving them express notice of their right to submit briefs to the Board and to be heard by the Board upon request in oral argument."

In paragraph 6 on page 8 the Board stated among the cases affected by the last stated determination of the Board was the instant case and on page 11 in paragraph 10 the Board stated that it "had determined on May 3, 1938, to vacate its order therein and restore the case to its docket for further proceedings", and it is to be assumed that such further proceedings are those referred to in detail in paragraph 5. The Corporation respectfully submits that these are not such proceedings as are contemplated in Section 10 (d) of the Act, which empowers the Board only to either modify or set aside in whole or in part any finding or order which was issued by it. If the Board were permitted to take the procedural steps indicated it would be reviewing its own order, not vacating or modifying it and merely suspending its effectiveness until such time as any procedural deficiencies had been attempted to be cured by it.

The Board, therefore, cannot be heard to urge that the rights which it claims have been granted to it pursuant to Section 10 (d) of the Act have been violated by the action of the Circuit Court of Appeals since the Board by its own statements in its Petition is not seeking to avail itself of such rights.

V:

The Board Should Not Be Permitted to Take Advantage of Its Own Acts in Failing to Certify the Transcript as Required by Law, and as It Undertook to Do on April 18, 1938 and Subsequently thereto.

Although the Act requires the Board to certify to the transcript of the record in a proceeding to review its order, no specified time is set forth within which the Board must make such certification.

In the instant proceeding the Corporation has done everything in its power that it could have done to secure the certification and filing of the transcript.

Simultaneously with the filing of its petition to review and the service of a copy thereof upon the Board, the Corporation requested the Board to prepare the transcript, certify to and file it in the Circuit Court of Appeals for the Third Circuit, agreeing to pay any expenses in that connection.

The Board, by letter dated April 18, 1938 undertook that it would certify to and file the transcript.

Consequently, when the Board undertook to certify and file the transcript, any further acts on the part of the Corporation were dispensed with and the burden of going forward from that time rested upon the Board. The Board failed to certify to and file the transcript although it conceded in its motion in the Circuit Court of Appeals to vacate the stay, that the transcript has been in its possession.

To permit the Board at this time to urge that the Corporation's certified transcript has not been filed and that therefore that Section 10 (d) of the Act is applicable would enable the Board to reap advantage of its own failure to comply with the law and its undertaking to the Corporation.

Conclusion.

For the reasons herein advanced, Republic Steel Corporation respectfully requests that the rule to show cause why a writ of prohibition and a writ of mandamus should not issue in this cause be discharged and the petition dismissed.

Respectfully submitted,

LUTHER DAY,

THOMAS F. PATTON,

JOSEPH W. HENDERSON,

THOMAS F. VEACH,

MORTIMOR S. GORDON,

*Of Counsel for Republic
Steel Corporation.*

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APPENDIX.

Section 10 of the National Labor Relations Act, Act of Congress, July 5, 1935, 49 Stat. 10.

Sec. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall be exclusive, and shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, code, law, or otherwise.

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. In any such proceeding

the rules of evidence prevailing in courts of law or equity shall not be controlling.

(c) The testimony taken by such member, agent or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon all the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. If upon all the testimony taken the Board shall be of the opinion that no person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint.

(d) Until a transcript of the record in a case shall have been filed in a court, as hereinafter provided, the Board may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it.

(e) The Board shall have power to petition any circuit court of appeals of the United States (including the Court of Appeals of the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (in-

cluding the Supreme Court of the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceeding, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board as to the facts, if supported by evidence, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the transcript. The Board may modify its findings as to the facts, or make new findings, by reason

of additional evidence so taken and filed, and it shall file such modified or new findings, which, if supported by evidence, shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate circuit court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the Court of Appeals of the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith served upon the Board, and thereupon the aggrieved party shall file in the court a transcript of the entire record in the proceeding, certified by the Board, including the pleading and testimony upon which the order complained of was entered and the findings and order of the Board. Upon such filing, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e), and shall have the same exclusive jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modi-

fyng, and enforcing as so modified, or setting aside in whole or in part the order of the Board; and the findings of the Board as to the facts, if supported by evidence, shall in like manner be conclusive.

(g) The commencement of proceedings under subsection (e) or (f) of this section shall not, unless specifically ordered by the court, operate as a stay of the Board's order.

(h) When granting appropriate temporary relief or a restraining order, or making and entering a decree enforcing, modifying, and enforcing as so modified or setting aside in whole or in part an order of the Board, as provided in this section, the jurisdiction of courts sitting in equity shall not be limited by the Act entitled "An Act to amend the Judicial Code and to define and limit the jurisdiction of courts sitting in equity, and for other purposes", approved March 23, 1932 (U. S. C., Supp. VII, title 29, secs. 101-115).

(i) Petitions filed under this Act shall be heard expeditiously, and if possible within ten days after they have been docketed.

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SUPREME COURT OF THE UNITED STATES.

No. 21, Original.—OCTOBER TERM, 1937.

In the Matter of the Petition of the
National Labor Relations Board for
a Writ of Prohibition and for a
Writ of Mandamus.

[May 31, 1938.]

Mr. Justice ROBERTS delivered the opinion of the Court.

The motion before us involves a construction of Section 10(d) (e) and (f) of the National Labor Relations Act,¹ providing for review of orders of the National Labor Relations Board.

May 16, 1938, the Board filed in this court a motion for leave to file a petition for writs of prohibition and mandamus directed to the judges of the United States Circuit Court of Appeals for the Third Circuit. Attached to the motion was the petition which set forth the following facts.

April 8, 1938, the Board, in a cause pending before it, issued an order directing the Republic Steel Corporation to desist from certain unfair labor practices and to take certain affirmative action. April 18 Republic filed in the Circuit Court of Appeals a petition for review alleging that the order violated the constitutional guarantee of due process because it was entered without an opportunity to Republic to support its contentions by argument or brief and thus the Board had denied it the hearing to which it was entitled. On the same day Republic requested of the Board a transcript of the entire record of its proceedings and the General Counsel of the Board replied: "I have your letter of April 18th, and received today a copy of your petition for review of the Board's order filed in the Third Circuit. We will proceed to get up the record as promptly as possible for certification to the court."

The rules of the Board extend to any party the right, within a reasonable period after the close of a hearing, to present oral argument before the trial examiner and, with his permission, to file

¹ 49 Stat. 454; U. S. C., Supp. H, Tit. 29, § 160(d)(e)(f).

briefs. They further provide that the Board may decide a cause with or without allowing the parties to present oral argument before the Board itself or to submit briefs to the Board. It is the Board's practice to grant leave to submit briefs to it or to make oral argument before it whenever so requested, but the rules do not expressly state that such a request may be made or that the request, if made, will be granted. No such request was made by Republic and no brief was received or oral argument heard before the entry of the order of April 8, 1938. The rules also provide for hearing before a trial examiner of causes initiated by the filing of charges before a regional director unless the cause is transferred for hearing before the Board in Washington. If the hearing is before an examiner he is to render an intermediate report containing findings of fact and recommendations as to the disposition of the cause, which are to be served upon the parties, and they are entitled to take exceptions to the intermediate report. In cases initiated by charges filed with the Board in Washington, or transferred for hearing before the Board, it may direct the trial examiner to prepare an intermediate report but the rules do not require that such a report shall be prepared or served, or that the Board shall serve its own proposed findings of fact and conclusions of law. The complaint against Republic was initiated by charges filed with the Board. The Board did not direct the trial examiner to prepare an intermediate report, and none was prepared or served, nor did the Board serve its own proposed findings of fact and conclusions of law prior to the entry of its order.

Subsequent to April 25, 1938, the Board instituted the practice of notifying the parties in all proceedings before it of their right to submit briefs to the Board and, upon request, to present oral argument to the Board; and further determined that, in cases thereafter to be decided, which had been initiated before it, or transferred to it for hearing (except for special reasons in particular cases) an intermediate report should be prepared by the trial examiner and served upon the parties or, in the alternative, proposed findings of fact and conclusions should be prepared by the Board and similarly served with express notice to the parties of their right to take exceptions to the report or the proposed findings and, upon request, to be heard by the Board, orally or upon brief in support of the exceptions. In cases already decided, in

which complaint had been made of the omission of an intermediate report or proposed findings, or of the lack of written or oral argument, the Board determined to vacate its orders, to restore the causes to its docket, and to reconsider and redetermine them after granting full opportunity of exception to proposed findings and conclusions and after the service of notice of the right of the parties to submit briefs and to be heard by the Board if they should so request. Among the cases in this category was that involving Republic.

April 30, 1938, Republic moved the Circuit Court of Appeals for a stay of the Board's order and, upon the hearing of the motion, the Board advised the court that it was considering vacating the order. May 3, upon ex parte application of Republic, the court issued a rule, returnable May 13, requiring the Board to show cause why it should not file in the court a certified transcript of the record of the proceedings against Republic and made an order restraining the Board from taking any steps or proceedings whatsoever in the cause until the return day of the rule.

May 13 the Board answered the rule of May 3 stating that the record was incomplete because the Board had determined on May 3 to vacate the order and to restore the cause to the docket for further proceedings and had been prevented from so doing by the restraining order issued May 3; the answer further set out that the provisions of Section 10(d) of the National Labor Relations Act deprive the court of jurisdiction to issue the restraining order and of jurisdiction to forbid the vacation of the Board's order and to compel the filing of a transcript of the Board's record as it stood prior to the decision to vacate the order. The court made the rule absolute and enjoined the Board from taking any further steps or proceedings in the cause until the transcript was filed.

The petition of the National Labor Relations Board asserts that the court was without jurisdiction to take this action and prays a writ of mandamus directing the judges who participated to vacate the order of May 13 and a writ of prohibition against the exercise of jurisdiction upon the petition of Republic to set aside the order of April 8 without affording the Board a reasonable opportunity to vacate it.

Upon presentation of the papers we granted leave to file them and entered a rule upon the judges of the Circuit Court to show

cause why the relief should not be granted as prayed, returnable May 23, and directed that, on the return day, the parties should be heard upon the question of the jurisdiction of the court to make the challenged order.

May 21, the judges filed their return admitting the allegations of the petition, except those as to the rules and practice of the Board, and its determination to vacate the orders in the Republic and other cases, which it neither admitted nor denied. The return showed that the order of May 13 was made in the view that, under Section 10(f) of the Act, Republic, by filing and serving its petition for relief, and by requesting the Board to file, or to deliver for filing, a certified transcript, complied with the jurisdictional requirements of the statute so far as was within Republic's power; that thereupon it became the duty of the Board forthwith to file a transcript and that, in the judges' opinion, jurisdiction of the court attached upon service of the petition for review and could not be defeated by the Board's failure to perform its statutory duty, which was to file the transcript. The return further shows that the court was of opinion that possible damage would result to Republic from delay due to the failure to file the transcript and this consideration moved the court to a construction of the Act which called for the entry of its order. The return concludes as follows: "Recognizing the debatable character of the question presented on this record, the respondents submit themselves to the judgment of this court as to whether or not they had jurisdiction to enter the order complained of and record their readiness to vacate the same if, in the opinion of this court, jurisdiction of the cause was lacking."

As is indicated by our action on the motion of the Board for leave to file, and by the return to the rule, the question is solely of the jurisdiction of the Circuit Court of Appeals. This question is to be answered in the light of Section 10 (d) (e) and (f) of the National Labor Relations Act, the pertinent portions of which are in the margin.² Counsel for the petitioner and for Republic have presented their views in oral argument and briefs.

² "(d) Until a transcript of the record in a case shall have been filed in a court, as hereinafter provided, the Board may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it.

"(e) The Board shall have power to petition any circuit court of appeals . . . for the enforcement of such order and for appropriate temporary

The Board's proceedings are administrative in character. Its final action is subject to judicial review in the manner specified in the Act. Subsection (d) of Section 10, in plain terms, invests the Board with authority, at any time before the transcript shall have been filed in court, to modify or set aside its order in whole or in part. The purpose of the provision obviously is to afford an opportunity to correct errors or to consider new evidence which would render the order inadequate or unjust. The words used are "Until a transcript of the record . . . shall have been filed in a court, as hereinafter provided", the Board may vacate or modify. The following subsections, (e) and (f), are those to which we turn for the connotation of the qualifying phrase. Subsection (e) grants the Board resort to a court for the enforcement of its order. That enforcement is to be obtained by filing a petition for enforcement and filing a certified transcript of the Board's proceedings. The subsection proceeds: "Upon such filing, the court shall cause notice thereof to be served upon" the person against whom enforcement is asked. Here it is quite plain that the court is without jurisdiction to take action at the behest of the Board until the transcript shall have been filed and notice of the filing of the petition and the transcript has been served. Subsection (f) affords relief to "any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought," . . . Such a person, the statute declares, "may obtain a review" of the Board's order by filing in court "a written petition praying that the order of the Board be modified or set aside." A copy of the petition is to be served forthwith upon the Board, and "thereupon the aggrieved party shall file in the court a transcript" of the

relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceeding, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein.

"(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals . . . by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith served upon the Board, and thereupon the aggrieved party shall file in the court a transcript of the entire record in the proceeding, certified by the Board, including the pleading and testimony upon which the order complained of was entered and the findings and order of the Board. Upon such filing, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e). . . ."

Board's proceedings. "Upon such filing, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e)," . . . Plainly the court may not proceed to review the Board's order under either section until a transcript is filed.

Counsel for Republic urge, in support of the Circuit Court's action, that the words, "as hereinafter provided", in subsection (d), refer to the filing of the transcript required in an enforcement proceeding initiated by the Board authorized by subsection (e) but cannot have reference to a proceeding for review initiated by any other party before the Board pursuant to subsection (f). The words of the statute do not warrant this construction. Two filings are required by subsection (f), the first of a petition, the second of a transcript. After prescribing the second, the Act provides that "Upon such filing, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e)", . . . The reference clearly is to the filing of the transcript and not to the filing of the petition. The contention that the Act cannot be applied in accordance with its apparent intent is that, as only the Board can certify the proceedings, and the petitioner under subsection (f) must file the certified transcript, such a construction would enable the Board to hold the transcript for an indefinite period and thus harass and embarrass a litigant, and delay, and perhaps deny, any effective judicial review. No such case is here presented. We have no occasion to determine what, if any, relief may be needed by or available to a party who has filed his petition for review where the Board does not desire to modify or set aside its order, but fails or refuses to furnish a transcript of its proceedings.

Jurisdiction as the term is to be applied in this instance, is the power to hear and determine the controversy presented, in a given set of circumstances. A court has jurisdiction, in another use of the term, to examine the question whether that power is conferred upon it in the circumstances disclosed but if it finds such power is not granted it lacks jurisdiction of the subject matter and must refrain from any adjudication of rights in connection therewith. Since the statute empowers the Board, before the filing of a transcript, to vacate or modify its orders, certainly it does not confer jurisdiction upon the reviewing court to

prohibit the exercise of the granted power. It is obvious that Congress intended to confer no jurisdiction upon the reviewing court to prevent the Board from seasonably vacating or modifying its order so as to make it comport with right and justice. The Act plainly indicates that the purpose was to give the court full and exclusive jurisdiction to review the Board's order in the respects indicated by the Act once the transcript of the Board's proceedings is before it. It is equally plain that the court is to have no power to prevent the Board from vacating or modifying its order prior to such plenary submission of the cause.

Counsel for Republic urges that ~~the~~ Board's petition to this court indicates that it does not intend irrevocably to abandon its former order but merely to regularize it and re-enter it after regularization and that the Act gives no power to do this after the Board has heard the case and issued an order. We have no occasion to speculate upon the future proceedings before the Board. It is enough that the petition shows that the Board desired to and would have vacated its order had it not been restrained by the action of the court: What the legal effect of its future proceedings may be we need not decide.

Counsel insist that Republic is aggrieved, within the meaning of subsection (f), by the Board's attempt to retain jurisdiction of the proceeding and take further steps in it. But the Act grants a review and relief only to a person aggrieved by an order of the Board and had the court not restrained the Board its order would have been vacated and there now would be no order outstanding. The Board is given no power of enforcement. Compliance is not obligatory until the court, on petition of the Board or any party aggrieved, shall have entered a decree enforcing the order as made, or as modified by the court. Statutory authority to the Board to vacate its order prior to the filing of the transcript does not seem to us to differ materially from a like statutory authority to a master in chancery to modify or recall his report to a court after submission but before action by the court. No one could successfully claim to be aggrieved in a legal sense by such a statutory provision or assert that the legislature is incompetent to confer such power upon a master with consequent lack of jurisdiction in the court to forbid its exertion.

The investiture of a court with jurisdiction to review an order on the merits only upon the filing of a transcript exhibiting the Board's final action is not a denial of due process as suggested by counsel.

We think the writs prayed are appropriate remedies in the circumstances disclosed.³ The Circuit Court was without jurisdiction of the subject matter. If the Board had complied with the orders made, a hearing would have resulted respecting the legality of supposed action of the Board which was not in law or fact the final action, review of which the statute provides. No adequate remedy would be open to the Board by way of certiorari from the court's ultimate review of an order which the Board was authorized and desired to set aside.

The expression in the return of readiness to vacate the order entered in the Circuit Court, if this court is of opinion that the tribunal lacked jurisdiction, renders the present issue of process supererogatory. Should the order not be vacated and occasion thus arise for the award of process, the clerk may issue it upon the order of a Justice of this Court.

Mr. Justice STONE and Mr. Justice CARDOZO took no part in the consideration or decision of this case.

A true copy.

Test:

Clerk, Supreme Court, U. S.

³ Compare *Virginia v. Rives*, 100 U. S. 313, 329; *In re Rice*, 155 U. S. 396, 402; *In re New York & Porto Rico S. S. Co.*, 155 U. S. 523; *In re Atlantic City Railroad*, 164 U. S. 633; *In re Winn*, 213 U. S. 458, 466-468; *Ex parte Harding*, 219 U. S. 363, 377; *Ex parte Oklahoma*, 220 U. S. 191, 208; *Ex parte Chicago, R. I. & P. Ry.*, 255 U. S. 273, 275.

SUPREME COURT OF THE UNITED STATES.

No. 21, Original.—OCTOBER TERM, 1937.

In the Matter of the Petition of the
National Labor Relations Board for
a Writ of Prohibition and for a
Writ of Mandamus.

[May 31, 1938.]

Mr. Justice BUTLER, dissenting.

The case is not here as if on writ of certiorari or appeal for review of error alleged to have been committed by the lower court. This is an application for the writs of mandamus and prohibition to command and restrain action by the judges named. These may not be granted unless the lower court was plainly without jurisdiction to hear and determine the case or the particular issue. *In re New York &c. Steamship Co.*, 155 U. S. 523, 531. *Ex parte Oklahoma*, 220 U. S. 191, 208. *Ex parte Chicago, R. I. & Pac. Ry.*, 255 U. S. 273, 275. Precisely, the question is whether, on the facts here disclosed, the court was without power to consider and decide upon the corporation's application for an order directing the Board to certify and file a transcript of the record and restraining in the meantime any other action by it. The decision just announced answers affirmatively, and that is the basis on which the Court commands vacation of the order of the lower court and prohibits it from reviewing the order of the Board without first giving it a reasonable opportunity to vacate its order; that is, without giving the Board more time to proceed under § 10(d). Obviously jurisdiction of the circuit court of appeals attached upon the filing of the corporation's petition for review and service of a copy on the Board. Any other construction of § 10(f) would let the Board, by refusing to certify a transcript of proceedings before it, prevent judicial review of its orders. Congress did not so intend. While the statute expressly requires the person aggrieved to file a certified transcript, it impliedly, but not less plainly, commands the Board to certify the record. This Court's decision rests on the

statement that, as the term is to be applied in this instance, jurisdiction is the power to hear and determine the controversy presented in a given set of circumstances. If the lower court had jurisdiction to entertain and decide the corporation's motion, writs of mandamus and prohibition may not be granted, for they are not available for correction of mere error or even abuse of discretion. *I. C. C. v. New York, N. H. & H. R. Co.*, 287 U. S. 178, 203-204. *Ex parte Whitney*, 13 Pet. 404, 408. *Ex parte Taylor*, 14 How. 3, 13. *Ex parte Railway Co.*, 101 U. S. 711, 720. *In re Hawkins, Petitioner*, 147 U. S. 486, 490. *In re Atlantic City Railroad*, 164 U. S. 633, 635. *In re James Pollitz*, 206 U. S. 323, 331. Cf. *Ex parte Simons*, 247 U. S. 231, 240.

Stripped of unnecessary details and language, the circumstances under which the lower court made the challenged order may be stated briefly.

Upon charges made by the Steel Workers' Organizing Committee, the Board, July 15, 1937, issued complaint alleging that the corporation was engaging in unfair labor practices. The corporation joined issue. Before it filed answer, hearings were held by the Board, from July 21 to July 24. After answer, there were hearings before an examiner at various times and places between August 9 and September 27. April 8, 1938, the Board made its decision and order. It found the corporation guilty of practices denounced by the Act. It ordered it to cease and desist, to reinstate certain persons, to pay sufficient to equalize what certain persons would have earned if employed by the corporation during specified periods, less the amount they earned at other work during those periods.

April 18, the corporation filed in the circuit court of appeals its petition to have the Board's order adjudged invalid. The petition charges that, in violation of the corporation's rights under the due process clause of the Fifth Amendment, the Board ordered the corporation to reinstate persons not alleged in the complaint to have been unlawfully discharged or discriminated against by the corporation; and so directed notwithstanding the corporation had never been accorded or offered a hearing or opportunity of making defense as to the asserted rights of those persons; that the Board made the order without affording the corporation op-

portunity to present its case by argument, orally or upon brief. It alleges that, under the terms of the order, about five thousand persons may claim reinstatement, petitioner is required to reinstate or pay them as specified, the average wage is \$6.50 per day. And it asserts that to defer reinstatement, pending decision by the court as to validity of the order, would involve a risk of such magnitude as imminently to threaten its right to have review in court. And the petition avers that unless the order be stayed, irreparable injury and loss will result to the corporation and that it will be denied review of a substantial part of the order. It prays service of a copy on the Board, certification by the Board of the transcript as required by law, invalidation of the order, direction to the Board to dismiss its complaint, and a stay of the order and of proceedings by the Board to enforce it, excepting such as may be taken in court.

April 18, the day on which the corporation filed petition for review, the Board, consistently with the corporation's claim as to its duty under the Act, agreed promptly to certify the transcript and to file it in court. April 22, the corporation filed an application for stay and temporary relief. Its application cited § 10(g), which declares that commencement of proceedings under § 10(f) shall not, unless specifically ordered by the court, operate as a stay of the Board's order. It stated: The purpose of the application was to prevent irreparable loss and denial of review. If, pending final determination of the case, petitioner should fail to make reinstatements in accordance with the order, its potential weekly liability would exceed \$95,000. On that basis the corporation sought suspension of the portion of the order that relates to reinstatement or payment of wages, so that, if it should be upheld, the corporation's liability to reinstate or to pay would commence ten days after the final decree of the court. In a brief submitted in support of its motion, the corporation maintained that the order is invalid because the corporation was not afforded a fair and full hearing and because the order is one for re-employment and not for reinstatement; and that unless the stay be granted, the corporation will suffer irreparable financial losses.

April 30 the corporation's motion came on for hearing. The Board appeared and argued against it. The court neither granted

nor denied the application. The rule to show cause, issued May 3, recites that at the hearing, April 30, the Board stated that it "was seriously considering withdrawing, modifying or changing its order in the case and reopening same." The Board's application for vacation of that order states that at the hearing on April 30 the Board advised the court that it was contemplating vacating its order, and would advise the court of its final position not later than May 4, 1938; that, on May 3, it notified the corporation that it had definitely decided to vacate the order; but that, before any steps to do so could be taken, the court had issued the restraining order. The Board maintained that as the transcript had not been filed, § 10(d) was applicable and that the Board then had the right to withdraw or vacate the order.

In its answer to the rule to show cause, the Board says that it was not guilty of refusal to certify or of dilatory tactics, and that on April 18 its counsel informed the corporation's counsel that the Board would as promptly as possible prepare the record for certification. "This task of considerable magnitude was forthwith commenced and was incomplete a week later when the supervening decision of the Supreme Court in *Morgan v. United States* (decided April 25, 1938) was rendered. . . . There is no question in this case, therefore, whether the court had jurisdiction to require the Board to file a record when such filing has been long delayed or refused by the Board. The Board has with all promptness elected to exercise its power to vacate its order under § 10(d), and there is no merit in petitioner's claim that that section is inapplicable because the Board has evaded its obligations under the Act."

In these circumstances the court did not lack jurisdiction to hear and determine the controversy presented by the corporation's application for an order directing the Board to certify the record for filing in court. The Act contemplates prompt action. Section 10(i) declares that petitions filed under it shall be heard expeditiously "and if possible within ten days after they have been docketed." Power under §10(d) to change or vacate its order does not enable the Board to delay filing the record. At the bar counsel expressed the opinion that the Board may *vacate* an order without notice, § 10(d). It had fifteen days, April 18 to May 3, to decide

whether to vacate the order or join issue. That period included a week before and a week after our decision in *Morgan v. United States*, *supra*. The Board does not claim that it needed until May 3 to certify the transcript. So the issue before the lower court was the very narrow one, whether for an unreasonable length of time the Board withheld the record. And that question involves consideration of subsidiary ones: To what extent, if at all, a certification may be delayed by the choice of the Board to enable it to consider modification or repeal of its order. Whether after decision in *Morgan v. United States* more than a reasonable time had elapsed. While there is room for difference of opinion on these questions, it is very hard to perceive on what ground it may be held that the court was without jurisdiction to decide them or even to conclude that the order was an arbitrary exertion of power, or that restraint against further delay by the Board involved an abuse of discretion.

I am of opinion that the lower court had jurisdiction of the case and of the issues decided by the challenged order, and that therefore the Board's application for writs of mandamus and prohibition should be denied.

Mr. Justice McREYNOLDS concurs in this opinion.